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Before the
SURFACE TRANSPORTATION BOARD

OCT 13 2011

Finance Docket No. 35412

MIDDLETOWN & NEW JERSEY RAILROAD, LLC--LEASE AND
OPERATION EXEMPTION--NORFOLK SOUTHERN RAILWAY COMPANY

FILED

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PETITION FOR RECONSIDERATION

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PETITION FOR RECONSIDERATION

Preliminary Statement

Petitioner, Samuel J. Nasca,^{1/} for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), submits this petition for reconsideration of the decision (Decision)^{2/} of the Surface Transportation Board (STB), dated September 22, 2011 (served September 23), which denied the petition to reject the notice of exemption, or revoke the exemption, which had been filed by Middletown & New Jersey Railroad, LLC (M&NJ) on August 31, 2010.^{3/}

^{1/} New York State Legislative Director for United Transportation Union, with offices at 35 Fuller Road, Albany NY 12205.

^{2/} The STB's decision and this petition for reconsideration, also embrace the STB's accompanying order at the end of the agency's action. (Decision, 13).

^{3/} The Decision's digest incorrectly states the STB's action denies a labor union representatives's request to terminate a lease. UTU-NY is unable to fathom such an agency misstatement, and can only suggest the purpose may reflect internal agency considerations. Of course, the decision indicates the digest constitutes no part of the decision, but this does not serve as an excuse.

The STB should reconsider the Decision, based upon material error. 49 CFR 1115.3(b)(2).^{4/} Upon such reconsideration, the STB is urged to reject M&NJ's notice of exemption, or revoke the exemption.

ARGUMENT

I. THE STB'S DECISION DOES NOT CORRECTLY PRESENT THE UTU-NY POSITION AND EVIDENCE REGARDING THE M&NJ'S NOTICE OR EXEMPTION

1. Line Abandonment. The Decision asserts UTU-NY claims that when M&NJ was "authorized" to acquire and operate the 6.5-mile Middletown-Slate Hill line from its predecessor Middletown & New Jersey Railway Co., Inc. (MNJC),^{5/} the MNJC had already abandoned the line. (Decision, 3-4). UTU-NY never made such an assertion, and is at a loss to appreciate the source for the STB's misunderstanding.^{6/}

The UTU-NY claim is that M&NJ, on August 31, 2010, when M&NJ filed its notice to leasing/operating the various Norfolk Southern Railway Company (NSR) lines, did not qualify as a "rail carrier" so as to serve notice for the acquisition under 49 U.S.C. 10902.

^{4/} UTU-NY also requests the STB take official notice of several issuances of the Railroad Retirement Board (7 pp.), attached as Appendix 1.

^{5/} F.D. No. 35227, Middletown and New Jersey Railroad, LLC-Acquisition and Operation Exemption-Middletown & New Jersey Railway Co., Inc. (Mar. 12, 2009) (served Mar. 20, 2009). 74 Fed. Reg. 11995-96. (3/20/09). The notice became effective April 5, 2009.

^{6/} Of course, the STB never "authorized" the M&NJ's acquisition of the MNJC's line. The filing of a notice with the STB under the non-carrier line acquisition exemption does not result in agency action to "authorize" the transaction. The exemption is self-executing after filing the notice. The STB's action in publishing the non-carrier's notice is ministerial in nature. There are a number of court decisions on this, of which agency staff is well aware.

In short, M&NJ had not instituted freight transportation operations under its earlier April 5, 2009 notice in F.D. No. 35227.

2. Freight Traffic. The Decision ignored the verified statement presented by UTU-NY that M&NJ had not performed rail freight transportation since April 5, 2009, to and including August 31, 2010. (S.V.S. Nasca, 2). (Decision, 4). Rather, the Decision erroneously found, as a fact, M&NJ held itself out as a common carrier and interchanged traffic with NSR, as part of the national rail system, based upon M&NJ counsel's representation (Ex. 5) in the M&NJ reply statement, purporting to be an NSR compilation of interchange traffic. (Decision, 4). Of course, M&NJ was well aware of the UTU-NY position regarding M&NJ "operations," but waited until the reply statement, to bring forward an unverified "interchange" report, with UTU-NY unable to respond, in accordance with the STB's December 23, 2010 procedural order. The STB erred in giving substantial weight to the unverified and inappropriate reply material advanced by M&NJ counsel.^{7/}

II. THE DECISION ERRS IN FINDING ACQUISITION
OF A RAIL LINE RENDERS A NON-CARRIER TO
CONSTITUTE A "RAIL CARRIER" FOR §10902 STATUS.

The Decision errs, as a matter of law, in finding that the mere acquisition of a rail line under §10901, renders the entity a "rail carrier" for purposes of invoking the §10902 class exemption. (Decision, 4, para. 2, lines 1-3). Contrary to the Decision, the rail carrier under §10902, by the language of §10902, must be

^{7/} To be sure, the STB's Decision appears to consider the reply statement material unnecessary, inasmuch as it rules that M&NJ became a "rail carrier" when it acquired the Middletown-Slate Hill line pursuant to the STB's "authorization" rather than when M&NJ may have commenced operations. (Decision, 4).

a rail carrier "providing transportation." Here, M&NJ did not "provide transportation." Under the STB's theory, an entity could build an empire of "paper" rail carriers under §10902.

The so-called "interchange" information advanced by M&NJ counsel appears to be utilization of the M&NJ trackage for car storage purposes. The STB has recognized that car storage is not track utilization for freight, or even for §10903 purposes. See: AB-1073, Alabama & Florida Ry. Co., Inc.-Abandonment Exemption-in Geneva, Coffee and Covington Counties, Ala., at ln.1 (served Aug. 9, 2011); AB-1065, Indiana Southwestern Railway Co.-Abandonment Exemption-In Posey and Vanderburgh Counties, Ind., at ln.1 (served Dec. 23, 2010).

Further support for the failure of M&NJ to exercise its §10901 notice in April 2009, is evidenced from recent issuances by the Railroad Retirement Board. Attached are determinations in B.C.D. 11-46 (3/11/11), B.C.D. 11-45 93/11/11), B.C.D. 11-47 ((3/11/11), and B.C.D. 08-8). Instead of a waiting period of only several months, in the case of East Penn Railroad, the M&NJ determinations did not come until some two years after March 20, 2009 and, we suspect, only then because of the instant STB's rejection/revocation proceedings, with attention drawn to the situation by railroad employee representatives. Moreover, we speculate that the only M&NJ "employee" is perhaps carried on the Regional Rail roster or working elsewhere than Middletown, NY.

It is clear that M&NJ was not a "rail carrier" within §10902 during the period April 5, 2009-August 31, 2010.

CONCLUSION

The STB should reject the M&NJ notice of exemption filed August 31, 2010, or revoke the exemption.

Due to the importance of the Decision's ruling that the mere filing of a non-carrier line acquisition notice under §10901, constitutes standing to invoke the carrier line acquisition under §10902, UTU-NY suggests that the cause be assigned for oral argument.

Respectfully submitted,

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for Samuel J. Nasca

October 13, 2011

Certificate of Service

I hereby certify I have served a copy of the foregoing on all parties of record by first class mail postage-prepaid.

Dated at
Washington DC
October 13, 2011

Gordon P. MacDougall

EMPLOYER STATUS DETERMINATION**Middletown & New Jersey Railroad, LLC**

This is the determination of the Railroad Retirement Board concerning the status of Middletown & New Jersey Railroad, LLC (Middletown) as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.) The status of Middletown under the Acts has not previously been considered.

Information about Middletown was provided by Mr. Robert C. Parker, President and CEO of Middletown¹. According to Mr. Parker, Middletown began operations on April 6, 2009, and has one employee who was first compensated on April 6, 2009. Regional Rail, LLC (RR) is the owner of Middletown²

In Surface Transportation Board Finance Docket No. 35227, decided March 12, 2009, Middletown filed a notice of exemption to acquire and operate 6.5 miles of rail line from Middletown & New Jersey Railway Company, Inc. (MN&J) (B A No 2217). A copy of the Agreement for Sale and Purchase of Business Assets, dated March 31, 2009, has been submitted. Review of that document indicates that Middletown purchased from MN&J all equipment, inventories, all of MN&J's rights under contracts held by MN&J; all accounts receivable, MN&J's business and goodwill, and all real property of MN&J. According to Mr. Parker, Middletown "is the direct successor to the Middletown & New Jersey Railway Co., Inc. as it relates to the ownership and operation of the rail line described above." Middletown interchanges with the Norfolk Southern.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code,

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231)

The evidence of record establishes that Middletown is a class III rail carrier operating in interstate commerce. Accordingly, it is determined that Middletown & New Jersey Railroad, LLC, became an employer within the meaning of section 1(a)(1)(i) of the

¹ Mr. Parker is also the President and CEO of Regional Rail, LLC.

² The employer status of Regional Rail, LLC is considered separately from this decision.

Railroad Retirement Act (45 U.S.C. § 231(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act as of April 6, 2009, the date it began operations and first compensated its employee

Original signed by:

FOR THE BOARD

Beatrice Ezerski

Secretary to the Board

EMPLOYER STATUS DETERMINATION**Middletown and New Jersey Railway Company, Inc.**

This is the determination of the Railroad Retirement Board concerning the continuing status of Middletown and New Jersey Railway Company, Inc. (MN&J) (B.A. No. 2217) as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351, et seq.) (RUIA). MN&J was found to be a covered employer under the Acts with service creditable from October 1, 1947, when it succeeded the Middletown and Unionville Railway (Legal Opinion L-47-957).

In a letter dated April 14, 2009, Mr. Paul Biberkraut, Chief Financial Officer of Chartwell International, Inc., the parent company of MN&J, advised the Agency that operations had ceased as of March 31, 2009, and "all MN&J railroad related assets and operations were sold to another corporation unrelated to us." According to Surface Transportation Board (STB) Finance Docket No. 35227, decided March 12, 2009, Middletown & New Jersey Railroad, LLC (Middletown) had filed a verified notice of exemption to acquire and operate 6.5 miles of rail line owned by MN&J¹. A copy of the Agreement for Sale and Purchase of Business Assets, dated March 31, 2009, has been submitted. Review of that document indicates that Middletown purchased from MN&J all equipment; inventories, all of MN&J's rights under contracts held by MN&J, all accounts receivable, MN&J's business and goodwill; and all real property of MN&J.

According to a letter dated April 17, 2009, from Mr. Robert C. Parker, President and CEO of Middletown, Middletown "is the direct successor to the Middletown & New Jersey Railway Co., Inc. as it relates to the ownership and operation of the rail line described above."

Section 202.11 of the Board's regulations provides that

The employer status of any company or person shall terminate whenever such company or person loses any of the characteristics essential to the existence of an employer status.

Based on the information set forth above, although MN&J has not yet dissolved as a business organization, it is clear that its character as a railroad no longer exists inasmuch as all of its railroad assets have been sold. Therefore, it is the determination of the Railroad Retirement Board that Middletown & New Jersey Railway Company, Inc. ceased being an employer under the RRA and RUIA on March 31, 2009, the date on which its railroad assets were sold.

Original signed by

FOR THE BOARD

Beatrice Ezerski

Secretary to the Board

¹ The employer status of Middletown is considered separately from this decision.

EMPLOYER STATUS DETERMINATION
Regional Rail, LLC

This is the determination of the Railroad Retirement Board concerning the status of Regional Rail, LLC (RR) as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351, et seq.) (RUIA). The status of RR as an employer under the Acts has not been previously considered

Information about RR was provided by Mr. Robert C. Parker, President and CEO of RR¹. According to Mr. Parker, RR was formed on July 24, 2007, and began operations on July 25, 2007. RR reportedly has no employees, and is described as a holding company and investment vehicle. RR is currently the parent company of Middletown & New Jersey Railroad, LLC (Middletown)², and East Penn Railroad, LLC, an employer covered by the Acts (B.A. No. 3394). Mr. Parker explained that RR has looked at a number of opportunities outside of the railroad industry, and recently made an offer to acquire a logistics company. In Surface Transportation Board (STB) Finance Docket No. 35228, decided March 12, 2009, the STB authorized the control of Middletown by RR.

No individual owns a controlling interest in both RR and a rail carrier, however Mr. Parker serves as President and CEO of RR, as well as Middletown and East Penn Railroad, LLC. Mr. Alfred M. Sauer, one of the controlling members of RR serves as the Vice President and CCO of RR, Middletown, and East Penn Railroad, LLC.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as.

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code,

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The evidence of record shows that RR is clearly not a rail carrier employer under the definition of employer in subparagraph (i) quoted above. This conclusion, however, leaves open the question as to whether RR can be considered an employer under the definition in subparagraph (ii). Under section 1(a)(1)(ii), a company is an employer if it

¹ Mr. Parker is also President and CEO of Middletown & New Jersey Railroad, LLC.

² The employer status of Middletown & New Jersey Railroad, LLC is considered separately from this decision.

meets **both** of two criteria. if it is owned by or under common control with a rail carrier employer and if it provides "service in connection with" railroad transportation. If it fails to meet either condition, it is not a covered employer within section 1(a)(1)(ii). In considering questions of coverage within the meaning of section 1(a)(1)(ii), courts have generally looked to the type of service being provided, the amount of work being performed for the railroad affiliate, and the amount of work being performed for the railroad industry

The evidence of record shows that RR is under common control with a rail carrier employer Mr. Parker serves as President and CEO of RR, as well as Middletown and East Penn Railroad, LLC Mr. Alfred M. Sauer, one of the controlling members of RR serves as the Vice President and CCO of RR, Middletown, and East Penn Railroad, LLC. Accordingly, the Board finds that RR is under common control with its rail carrier subsidiaries, Middletown and East Penn

The question still remains whether RR performs a "service in connection with" railroad transportation. Section 202.7 of the Board's regulations (20 CFR 202.7) defines service in connection with railroad transportation as follows.

The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad

As stated previously, Mr Parker advised that RR acts solely as a holding company and investment vehicle. The evidence of record indicates that RR is not performing a service in connection with railroad transportation. Accordingly, it is determined that Regional Rail, LLC, as it operates at the present time, is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

Michael S. Schwartz

V. M Speakman

Jerome F. Kever

**EMPLOYER STATUS DETERMINATION
East Penn Railroad, LLC (ESPN)**

This is a determination of the Railroad Retirement Board concerning the status of East Penn Railroad, LLC (ESPN) as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.)(RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.)(RUIA). The status of ESPN under the Acts has not previously been considered.

Information about ESPN was furnished by its Office Manager, Diane Klein. ESPN is a subsidiary (100% owned) of Regional Rail, LLC.¹ Mr. Robert C. Parker is the Chief Executive Officer of ESPN. ESPN began operations and first began compensating employees on August 28, 2007.

In Surface Transportation Board (STB) Finance Docket No. 35056, decided July 3, 2007, John C. Nolan, a noncarrier individual, Penn Eastern Rail Lines, Inc. and East Penn Railways Inc. jointly filed a verified notice of exemption to merge two existing rail carriers into one surviving rail corporation (ESPN) in order to simplify the corporate structure². ESPN will operate approximately 251.1 miles of railroad line which will be owned by ESPN. The rail lines include: Octoraro Line (25.6 miles), Wilmington & Northern Line (29 miles), Lancaster Northern (12.1 miles) Colebrookdale Line (8.6 miles), Manheim Line (1 mile), Kutztown Line (4.1 miles), Perkiomen Line (15.6 miles), Quakertown Line (10 miles), Chester Valley Line (2 miles), Bristol Terminal (1.7 miles), and North Philadelphia Contract Switching (5 miles). The STB decision stated that ESPN intended to consummate the transaction on or about July 27, 2007. ESPN will interchange freight with Norfolk Southern, CSX, and Brandywine Valley Railway.

According to Ms. Klein, ESPN has 17 employees, 15 full-time and 2 part-time. Ms. Klein further stated that ESPN provides common carrier freight service and expects to handle approximately 8,100 carloads of freight annually. Ms. Klein also stated that ESPN will perform no passenger service.

¹ Ms. Klein advised that Regional Rail LLC does not have any employees at this time, as "they are being paid as employees of ESPN." Ms. Klein also advised that at this time, ESPN has no brother/sister companies and Regional Rail LLC has no other subsidiaries.

² The two carriers to be merged are East Penn Railway which was determined to be a covered employer by L-96-17 and Penn Eastern Rail Lines which was determined to be a covered employer by L-98-15.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

- (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;

Section 1 of the RUIA (45 U.S.C. § 351) contains essentially the same definition, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The evidence of record establishes that ESPN is a rail carrier operating in interstate commerce. Accordingly, it is determined that East Penn Railroad LLC became an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act and its corresponding provision of the Railroad Unemployment Insurance Act effective August 28, 2007, the date on which it began operations and as of which its first employee was first compensated. [Cf. Rev. Rule. 82-100, 1982-1 C.B. 155, wherein the IRS held that a company became an employer under the Railroad Retirement Tax Act on the date it hired employees to perform functions directly related to its carrier operations.]

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever